Supreme Court, U.S.
FILED
NOV 13 2003
OFFICE OF THE CLERK

(9)

No. 02-1809

IN THE

Supreme Court of the United States

J. ELLIOT HIBBS, in his official capacity as Director of the Arizona Department of Revenue,
Petitioner,

v.

KATHLEEN M. WINN, Arizona taxpayer; DIANE WOLFTHAL, Arizona taxpayer; MAURICE WOLFTHAL, Arizona taxpayer; LYNN HOFFMAN, Arizona taxpayer,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE HONORABLE TRENT FRANKS, THE ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION, AND THE CENTER FOR ARIZONA POLICY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

BENJAMIN W. BULL*
GARY S. MCCALEB
JOSHUA W. CARDEN
ELIZABETH A. MURRAY
ALLIANCE DEFENSE FUND
15333 N. Pima Rd., Ste. 165
Scottsdale, AZ 85260
(480) 444-0020
(480) 444-0028 (fax)

**Counsel of Record*

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI* IN THIS CASE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. THE NINTH CIRCUIT HAS CREATED A NOVEL, NARROW, BRIGHT-LINE TEST: THE "MONEY IN, MONEY OUT" THEORY OF JURISDICTION UNDER THE TAX INJUNCTION ACT 4

II. PRINCIPLES OF COMITY BAR FEDERAL COURT INTERFERENCE IN A STATE TAXATION SCHEME 7

A. Throughout Its History, This Court Has Recognized Principles of Comity between Federal and State Courts 7

B. This Court Applies Principles of Comity in the Context of State Tax Systems 9

C. Appellate Courts Have Correctly Applied Principles of Comity in the Context of State Tax Systems 10

D. This Court Should Apply Principles of Comity in This Case Because There is an Adequate Remedy in State Court 12

III. THE TAX INJUNCTION ACT DEPRIVES THE DISTRICT COURT OF SUBJECT MATTER JURISDICTION IN THIS CASE 14

A. The Plain Language of the Tax Injunction Act Bars Federal Court Jurisdiction in this Case.....14

1. The term "assessment" encompasses Arizona's tax credit.....14

2. Arizona has already provided a "plain, speedy and efficient remedy" within the meaning of the Act.....16

B. The Purpose and Legislative History of the Tax Injunction Act Belie the Ninth Circuit's Narrow Interpretation.....19

1. The Purpose of the Tax Injunction Act Supports a Broad Interpretation of the Act..19

2. The Tax Injunction Act's legislative history conflicts with the Ninth Circuit's decision.....26

CONCLUSION.....28

TABLE OF AUTHORITIES

Cases **Page**

Amarok Corp. v. State of Nev., Dept. of Taxation,
935 F.2d 1068 (9th Cir. 1991).....17

Ark. v. Farm Credit Servs. of Cent. Ark.,
520 U.S. 821 (1997).....9, 15, 19, 20, 21

Ashton v. Cory,
780 F.2d 816 (9th Cir. 1986).....16, 17, 24

Bland v. McHann,
463 F.2d 21 (5th Cir. 1972), *cert. denied*, 410 U.S. 966 (1973).....18

Blangeres v. Burlington N., Inc.,
872 F.2d 327 (9th Cir. 1989).....25

Boise Artesian Hot & Cold Water Co. v. Boise City,
213 U.S. 276 (1909).....8, 13

Bright v. Bechtel Petroleum, Inc.,
780 F.2d 766 (9th Cir. 1986).....11, 16

Brooks v. Sulphur Springs Valley Elec. Coop.,
951 F.2d 1050 (9th Cir. 1991), *cert. denied*, 503 U.S. 938 (1992).....17

Cal. v. Grace Brethren Church,
457 U.S. 393 (1982).....21, 26

Colonial Pipeline Co. v. Collins,
921 F.2d 1237 (11th Cir. 1991).....22

Comenout v. State of Wash.,
722 F.2d 574 (9th Cir. 1983).....25, 26

Covell v. Heyman,
111 U.S. 176 (1884).....7, 8

Dillon v. State of Mont.,
634 F.2d 463 (9th Cir. 1980).....22, 23, 25

Ex parte Young,
209 U.S. 123 (1908).....19, 20

Fair Assessment in Real Estate, Ass'n, Inc. v. McNary,
454 U.S. 100 (1981).....12, 13, 19, 20, 26

Forgan v. Bainbridge,
274 P. 155 (Ariz. 1928).....7

Great Lakes Dredge & Dock Co. v. Huffman,
319 U.S. 293 (1943).....9

Hawaiian Tel. Co. v. State Dept. of Labor and Indus. Relations,
691 F.2d 905 (9th Cir. 1982).....11

Hilton v. Guyot,
159 U.S. 113 (1895).....7

In re Gillis,
836 F.2d 1001 (6th Cir. 1988).....10, 21, 22

Inhabitants of Montclair Township v. Ramsdell,
107 U.S. 147 (1883).....15

Jefferson County v. Acker,
527 U.S. 423 (1999).....21

Jerron West, Inc. v. State of Cal., State Bd. of Equalization,
129 F.3d 1334 (9th Cir. 1997), *cert. denied*, 525 U.S. 819 (1998).....11, 17, 25

Kotterman v. Killian,
972 P.2d 606 (Ariz. 1999), *cert. denied*, 528 U.S. 921, *cert. also denied by Rhodes v. Killian*, 528 U.S. 810 (1999).....1, 6, 18, 28

Kotterman v. Killian,
528 U.S. 921 (1999).....27

Mandel v. Hutchinson,
494 F.2d 364 (9th Cir. 1974).....18, 24, 25

Matthews v. Rodgers,
284 U.S. 521 (1932).....8, 9

McCulloch v. Maryland,
4 Wheat. 316 (1819).....4

Miller v. City of Los Angeles,
755 F.2d 1390 (9th Cir. 1985), *cert. denied*, 474 U.S. 995 (1985).....11

Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation,
425 U.S. 463 (1976).....21

Mudge v. U.S.,
308 F.3d 1220 (Fed. Cir. 2002).....15

New State Ice Co. v. Liebmann,
285 U.S. 262 (1932).....2

Patel v. City of San Bernardino,
310 F.3d 1138 (9th Cir. 2002).....11, 17

Pennoyer v. Neff,
95 U.S. 714 (1877).....7

Perez v. Ledesma,
401 U.S. 82 (1971).....24

Poer and Co. v. Counties of Alameda,
725 F.2d 1234 (9th Cir. 1984).....11, 16, 22, 23

Prentis v. Atlantic Coast Line Co.,
211 U.S. 210 (1908).....8

Rosewell v. LaSalle Nat'l Bank,
450 U.S. 503 (1981), *reh'g denied*, 451 U.S. 1011 (1981).....16, 17, 19, 20, 28

Singer Sewing Mach. Co. of N.J. v. Benedict,
229 U.S. 481 (1913).....13

State Tax Comm'n v. Anderson Dev. Corp.,
574 P.2d 43 (Ariz. Ct. App. 1997), *review denied*.....10

Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998).....5

Tully v. Griffin, Inc.,
429 U.S. 68 (1976).....10, 19, 20

U.S. v. Lopez,
514 U.S. 549 (1995).....2

U.S. v. Menasche,
348 U.S. 528 (1955).....15

U.S. Brewers Ass'n, Inc. v. Perez, 592 F.2d 1212 (1st Cir. 1979), *cert. denied*, 444 U.S. 833 (1979).....10, 11

Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.,
454 U.S. 464 (1982).....6

Winn v. Killian,
307 F.3d 1011 (9th Cir. 2002).....5, 9, 12, 15, 18, 27

Winn v. Killian,
321 F.3d 911 (9th Cir. 2003).....14, 18

Younger v. Harris,
401 U.S. 37 (1971).....9, 12

Zelman v. Simmons-Harris,
536 U.S. 639 (2002).....6

Statutes

28 U.S.C. § 1341 .....4, 14, 21

ARIZ. REV. STAT. § 43-1089.....1, 16

Secondary Authorities

Black's Law Dictionary (6th ed. 1990).....15

81 CONG. REC. 1,417 (1937).....27

H.R. REP. No. 1503 (1937) 27

The Oxford English Dictionary (1961) 15

S. REP. No. 1035 (1937).....27

Webster's Third New International Dictionary (1981).....15

INTEREST OF *AMICI* IN THIS CASE[1]

The Honorable Trent Franks – Representative Franks authored the bill that became ARIZ. REV. STAT. § 43-1089, after his tenure as an Arizona legislator. Section 43-1089, which is at issue in this case, allows taxpayers to reduce their state tax liability by claiming a credit for amounts they have donated to a school tuition organization. An avid supporter of educational choice, Congressman Franks is currently introducing similar legislation at the federal level.

The Arizona Christian School Tuition Organization (ACSTO) – ACSTO is the second largest recipient of the funds that Arizona taxpayers privately and independently choose to donate under ARIZ. REV. STAT. § 43-1089. School tuition organizations are non-profit corporations that collect funds, evaluate applications, and award scholarships to deserving students who wish to attend private schools. As one of these organizations, ACSTO's interest in this case is self-evident.

The Center for Arizona Policy (CAP) – CAP was established in 1995 as a non-profit organization dedicated to strengthening Arizona families through policy and education. CAP accomplishes this by actively educating Arizonans on educational choice, religious freedom, parenting, and other issues. CAP strongly supports educational choice and worked with Congressman Franks in the enactment process of ARIZ. REV. STAT. § 43-1089. CAP also filed an *amicus* brief in defense of the statute in *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999).

---

[1] All parties have consented to the submission of this brief through letters filed with the Clerk of the Court. *Amici* state that no portion of this brief was authored by counsel for a party and that no person or entity other than amici or their counsel made a monetary contribution to the preparation or submission of this brief.

Amici believe that this case presents the classic opportunity for the federal courts to exercise comity and recognize the inherent dignity and value of the state branch of our dual legal system. "In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *U.S. v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J. concurring) (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). In seeking the "best solution" to advance its important interest in improving education, Arizona has successfully experimented with its scheme of assessment, levy, and collection of taxes by including a tax credit – one of many – whereby Arizona taxpayers may reduce their State tax liability by claiming a tax credit for capped amounts they have paid to a "school tuition organization."

SUMMARY OF THE ARGUMENT

Arizona has decided to advance certain fiscal and policy goals through an enacted tuition tax credit, which is part of its larger taxation scheme. The statute at issue has already withstood constitutional challenge in prior state court litigation, but Respondents seek to challenge the statute in federal court. This Court should bar this action.

Federal court interference in state taxation schemes has long been disfavored. Even without the Tax Injunction Act, principles of comity bar subject matter jurisdiction in this case. The panel ignored the scope of comity and the Act to conclude that federal court jurisdiction was proper. To reach this conclusion, the court exchanged well-established principles of comity and the text of the Act for a novel

"money in, money out" bright-line test. This new test is based on one question: "Will the state receive more money if the suit is allowed?" Employing this test, the panel examined the merits of the case, assumed a positive answer, and declared the Act and comity were inapplicable. This approach conflicts with this Court's precedent: jurisdiction is a threshold question to be answered before reaching the merits.

Principles of comity require federal courts to refrain from interfering in state matters where an adequate remedy exists at state law. "Our Federalism" mandates this approach because of the concurrent jurisdiction shared by the federal and state systems. Comity applies specifically in the context of state taxation. Respondents have not shown the lack of an adequate state remedy – but simply an adverse state court decision. There is no constitutional imperative for federal courts to second guess state court decisions.

Furthermore, Congress has explicitly barred federal court interference in this case by enacting the Tax Injunction Act. This Court has interpreted the Act to foreclose federal court injunctive and declaratory relief in the "assessment, collection, and levy" of state taxes whenever there is a "plain, speedy, and efficient" remedy to be had in state court. Arizona's tax credit is part of the state's broad taxation scheme and qualifies as an "assessment" under the Act's plain language. In this case, the Ninth Circuit ignored the Act's text, the Act's purpose and legislative history, this Court's precedent, other appellate precedent, and even its own precedent to reach its desired conclusion. The panel's erroneous decision narrows the Act, the definition of "assessment," and principles of comity beyond recognition.

The Act, broad principles of comity, and the consistent precedent of this Court and appellate courts all dictate one

conclusion: federal subject matter jurisdiction is barred in this case. There is no reason for federal court interference in the delicate scheme of taxation that Arizona has chosen to advance its fiscal and policy goals. This Court should reverse the panel decision below.

ARGUMENT

This case addresses the delicate balance between the federal and state governments in the context of Arizona's tax laws. Here, principles of comity and the Tax Injunction Act are bars to federal court jurisdiction. These bars are premised on our system of dual sovereigns: the national and state governments:

> That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths which have never been denied.

McCulloch v. Md., 4 Wheat. 316, 425 (1819).

I.

THE NINTH CIRCUIT HAS CREATED A NOVEL, NARROW, BRIGHT-LINE TEST: THE "MONEY IN, MONEY OUT" THEORY OF JURISDICTION UNDER THE TAX INJUNCTION ACT.

"The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." Tax Injunction Act, 28 U.S.C. § 1341.

Though this Court and other circuits have interpreted the Act, and its underlying principles of comity, as a broad jurisdictional bar, the Ninth Circuit has not followed suit. Instead, the panel below created a bright-line "money in, money out" test, which essentially asks one question: "Will more money come into state coffers if the plaintiffs prevail in the lawsuit?" If the answer is "yes," then, according to the Ninth Circuit, federal jurisdiction is proper. On the other hand, if money "goes out" from the treasury, jurisdiction is declined. This test ignores broad, longstanding principles of comity and the Tax Injunction Act's explicit removal of federal court jurisdiction. *See* Parts II and III, *infra.* Furthermore, the court's reasoning is circular.

The circle began with the court examining the facially neutral Arizona taxation law for its effect on the state coffers. *Winn v. Killian*, 307 F.3d 1011, 1013 (9th Cir. 2002). In the next arc, the court noted that funds flowing through school tuition organizations to individual students may ultimately benefit religious organizations. *Id.* at 1014. In the third arc, the court posited that, if "the STO tax scheme were to be struck down on Establishment Clause grounds, Arizona's ability to raise revenue . . . would be enhanced." *Id.* at 1017. In the final arc, the court concludes that, because striking down the law would increase state revenue, this suit does not interfere with tax collection and, thus, is not barred by the Tax Injunction Act. *Id.* at 1018 ("the relief requested . . . would result in the state's receiving more funds that could be used for the public benefit"). The fallacious circle is complete: jurisdiction is obtained by examining the merits and assuming a result which would confer jurisdiction – a loose approach to jurisdiction for which this Court has previously chastised the Ninth Circuit. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998); *and see id.* at 101-102 ("For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has

no jurisdiction to do so is, by very definition, for a court to act ultra vires.").[2]

Respondents are clearly disappointed with the Arizona Supreme Court decision that upheld the constitutionality of the tax credit challenged here. *Kotterman v. Killian*, 972 P.2d 606, 625 (Ariz. 1999), *cert. denied,* 528 U.S. 921, *cert. also denied by Rhodes v. Killian*, 528 U.S. 810 (1999) ("We hold that the tuition tax credit is a neutral adjustment mechanism for equalizing tax burdens and encouraging educational expenditures. Petitioners have failed to demonstrate that it violates either the Federal or the Arizona Constitution."). Despite state court litigation in a virtually identical case, Respondents seek another bite at the jurisprudential apple in federal court. That bite is forbidden by principles of comity and the Tax Injunction Act. *Amici* urge this Court to reject the Ninth Circuit's bright-line test, its myopic reading of the Tax Injunction Act, and its disregard of the important underlying principles of comity.

---

[2] The Ninth Circuit's novel approach to the Tax Injunction Act coincidentally arose from an Establishment Clause challenge by plaintiffs seeking to enjoin the director of revenue from "diverting" funds to religious organizations. Under these facts, it is very unlikely that plaintiffs have standing to sue, even if the court had jurisdiction. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (Article III requires actual or threatened injury, fairly traceable to the challenged action, which is likely to be redressed by a favorable decision); *and see Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002) ("[N]o reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement."). It is difficult to see how Arizona's director of revenue is "diverting funds" to religious schools in alleged violation of the Establishment Clause when the choice is left to individual taxpayers, and the director has absolutely no say in the decision. Indeed, the Arizona Supreme Court has already properly decided the matter. *Kotterman v. Killian*, 972 P.2d 606, 625 (Ariz. 1999), *cert. denied,* 528 U.S. 921, *cert. also denied by Rhodes v. Killian*, 528 U.S. 810 (1999).

II.

PRINCIPLES OF COMITY BAR FEDERAL COURT INTERFERENCE IN A STATE TAXATION SCHEME

A. Throughout Its History, This Court Has Recognized Principles of Comity between Federal and State Courts.

Principles of comity (originally known as "the comity of nations") guide the relationship between dual sovereigns. *Hilton v. Guyot*, 159 U.S. 113, 163 (1895). The comity of nations is the "extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation." *Id.* Principles of comity also guide relationships between: 1) the United States and foreign nations, *Hilton*, 159 U.S. at 163, 2) a state with another state, *Forgan v. Bainbridge*, 274 P. 155, 158 (Ariz. 1928), and 3) the United States and a state, *Covell v. Heyman*, 111 U.S. 176, 182 (1884). In cases involving international law, comity is neither an "absolute obligation," nor "mere courtesy and goodwill"; it is the "recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation." *Hilton*, 159 U.S. 113, 163-64 (1895). "It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy, or prejudicial to its interests." *Id.* at 165.

In comparison, "states of the Union are considered as foreign nations, and separate sovereignties," except as otherwise qualified by the Federal Constitution. *Forgan*, 274 P. at 158 (citing *Pennoyer v. Neff*, 95 U.S. 714 (1877)). Thus, principles of comity have much greater import within

our federalist system of government, than in the international context: "[Comity] between state courts and those of the United States . . . is a principle of right and of law, and therefore of necessity. It leaves nothing to discretion or mere convenience." *Covell*, 111 U.S. at 182.

Courts continued to observe rules of comity as "principle[s] of right and of law" into the twentieth century. *See Matthews v. Rodgers*, 284 U.S. 521, 525 (1932) ("The scrupulous regard for the rightful independence of state governments . . . and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it."); *Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U.S. 276, 282 (1909) ("[A] proper reluctance to interfere by prevention with the fiscal operations of the state governments has caused [this Court] to refrain from so doing in all cases where the Federal rights of the persons could otherwise be preserved unimpaired."); *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 237 (1908) ("[A]s applied to Federal interference with state acts, the observance of this rule of comity should be regarded as an obligation.").

Justice Black gave perhaps the most stirring modern restatement of comity in:

> [T]he notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the

> profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism."

Younger v. Harris, 401 U.S. 37, 44 (1971).

Thus, "Our Federalism" requires the consistent and continued application of comity to prevent erosion of the delicate balance between the state governments' general powers and the federal government's enumerated powers. In this case, comity weighs heavily in favor of declining federal jurisdiction.

B. This Court Applies Principles of Comity in the Context of State Tax Systems.

This Court has acknowledged that "[t]he power to tax is basic to the power of the State to exist." *Ark. v. Farm Credit Servs. of Cent. Ark.*, 520 U.S. 821, 826 (1997). Because of this high level of importance, "[t]he States' interest in the integrity of their own processes is of particular moment respecting questions of state taxation." *Id.*

Unlike the Ninth Circuit's decision below, *Winn v. Killian*, 307 F.3d 1011 (9th Cir. 2002), this Court has never limited the application of comity to suits seeking to restrain the collection of a tax. Rather, this Court has a "scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations." *Matthews*, 284 U.S. at 525. This restraint on interference with state "fiscal operations" is but one part of the comity afforded the "internal economy and administration" and the general "domestic policy of the states." *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 298 (1943) (noting that Congress had approved the

practice of comity through enactment of the Tax Injunction Act); *see also State Tax Comm'n v. Anderson Dev. Corp.*, 574 P.2d 43, 46-47 (Ariz. Ct. App. 1997) (legislation effects domestic policy via tax incentives), *review denied*.

C. Appellate Courts Have Correctly Applied Principles of Comity in the Context of State Tax Systems.

Lower appellate courts have joined this Court in recognizing that principles of comity prohibit federal court interference in state tax matters.

The Sixth Circuit stated that "the scope of federal court deference based on principles of comity is substantially broader than that required under the Tax Injunction Act." *In re Gillis*, 836 F.2d 1001, 1006 (6th Cir. 1988). The *Gillis* court concluded, "[E]ven if the facts of a state tax matter do not technically fit within the language of § 1341, the federal courts should restrain from interfering in the state proceedings." *Id.* at 1005.

The First Circuit used principles of comity to bar an attempted federal court challenge to a Puerto Rican tax. *U.S. Brewers Ass'n, Inc. v. Perez*, 592 F.2d 1212, 1214 (1st Cir. 1979), *cert. denied*, 444 U.S. 833 (1979); *and see id.* at 1215 ("Sound equity practice and a concern for interests of federalism" barred relief). The *Perez* court based its decision on the considerations of equity practice, principles of federalism, and "the imperative need of a State to administer is own fiscal operations." *Id.* (quoting *Tully v. Griffin*, 429 U.S. 68, 73 (1976)). In addition, the *Perez* court noted:

> [A]n order of a federal court requiring Commonwealth officials to collect taxes which its legislature has not seen fit to impose on its citizens strikes us as a particularly inappropriate involvement in a state's management of its fiscal operations.

Id. The case at bar also presents a request for a federal order requiring Arizona to collect taxes "which its legislature has not seen fit to impose." *Id.* This is precisely the scenario where comity should bar federal jurisdiction.

The novel "money in, money out" test is all the more noxious in light of the Ninth Circuit's earlier – proper – application of comity to deny jurisdiction in a case brought, like the instant case, under 42 U.S.C. § 1983. *Patel v. City of San Bernardino*, 310 F.3d 1138, 1142 (9th Cir. 2002).[3] There, the court broadly interpreted the Tax Injunction Act by stating: "we will not carve out a new exception [to the Act] here, particularly one that would offend principles of comity by encouraging bifurcated litigation between state and federal courts." *Id.* This bifurcated litigation is precisely what Petitioner properly seeks to avoid in this case.

The case now before the court radically narrows comity: "comity . . . prevent[s] interference with the states' collection

---

[3] *Patel* is but one of many prior examples where the Ninth Circuit broadly applied comity to bar federal jurisdiction. *See, e.g., Jerron West, Inc. v. State of Cal., State Bd. of Equalization*, 129 F.3d 1334, 1338 (9th Cir. 1997) ("the principle of comity alone would bar federal courts from granting damages relief in state tax cases"); *Bright v. Bechtel Petroleum, Inc.*, 780 F.2d 766, 771 (9th Cir. 1986) ("the principle of comity generally bars challenges to the validity of state tax systems in federal court"); *Poer and Co. v. Counties of Alameda*, 725 F.2d 1234, 1236 (9th Cir. 1984) (Tax Injunction Act and principle of comity barred action); *Miller v. City of Los Angeles*, 755 F.2d 1390 (9th Cir. 1985) ("Taxpayers are barred by the principle of comity from asserting section 1983 actions against the validity of state tax systems in federal court."), *cert. denied*, 474 U.S. 995 (1985); *Hawaiian Tel. Co. v. State Dept. of Labor and Indus. Relations*, 691 F.2d 905, 910 (9th Cir. 1982) ("We also note that McNary suggests that the principle of comity alone would bar this action.").

of revenue." *Winn*, 307 F.3d at 1019. This deflated version of comity is not the robust, respectful principle applied by this Court, other appellate courts, and even the Ninth Circuit itself in prior decisions. Justice Black reminds us of comity's broad scope:

> What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.

Younger, 401 U.S. at 44-45.

Additional support for following principles of comity in this case is gained by realizing that there is an adequate remedy in state court.

D. This Court Should Apply Principles of Comity in This Case Because There is an Adequate Remedy in State Court.

As a practical matter, the existence of a "plain, speedy and efficient remedy" in state court is what makes comity a just and useful way to regulate access to federal courts. As this Court has noted, "Prior to enactment of § 1341, virtually all federal cases challenging state taxation sought equitable relief." *Fair Assessment in Real Estate, Ass'n, Inc. v. McNary*, 454 U.S. 100, 107 (1981). Therefore, courts were guided by the principle that equitable relief is not available

"in any case where a plain, adequate, and complete remedy may be had at law." *Singer Sewing Mach. Co. of N.J. v. Benedict*, 229 U.S. 481, 484 (1913).[4] This Court has explained:

> Such restraint was particularly appropriate because of the delicate balance between the federal authority and state governments, and the concomitant respect that should be accorded state tax laws in federal court.

Fair Assessment, 454 U.S. at 108.

Courts have uniformly held that "the illegality or unconstitutionality of a state or municipal tax or imposition is not of itself a ground for equitable relief in the courts of the United States." *Singer Sewing*, 229 U.S. at 485. This long-standing rule indicates the confidence of federal courts that state courts are able to preserve, unimpaired, the federal rights of United States citizens. *Boise Artesian*, 213 U.S. at 281-82.

In this case, the adequate remedy at state law allows comity to bar federal court jurisdiction. As Circuit Judge Kleinfeld noted below:

> The district court did just what the law requires. . . . Arizona provides a means to challenge its tax code and allows parties to raise federal constitutional challenges to its provisions. Indeed, this very tax credit was challenged on constitutional grounds throughout the Arizona courts. The Arizona Supreme Court provided a thoughtful and

---

[4] There is no significant difference between remedies that are "plain, speedy and efficient," as used in the Act, and remedies that are "plain, adequate, and complete," as used in explaining the doctrine of equitable restraint. *Fair Assessment*, 454 U.S. at 116 n.8.

scholarly opinion on the merits of the constitutionality of the tax credit at issue in this case.

Winn v. Killian, 321 F.3d 911, 914 (9th Cir. 2003) (Kleinfield, J., dissenting from denial of rehearing *en banc*).

The principles of comity that characterize our dual system have long been recognized by this Court and lower federal courts. Therefore, this Court should reverse the Ninth Circuit and hold that principles of comity deprive the federal district court of subject matter jurisdiction in this case.

III.

THE TAX INJUNCTION ACT DEPRIVES THE DISTRICT COURT OF SUBJECT MATTER JURISDICTION IN THIS CASE

By enacting the Tax Injunction Act, Congress saw fit to apply the broad principles of comity specifically to protect the states' ability to manage their respective tax systems.

A. The Plain Language of the Tax Injunction Act Bars Federal Court Jurisdiction in this Case.

1. The term "assessment" encompasses Arizona's tax credit.

"The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." Tax Injunction Act, 28 U.S.C. § 1341. The plain language of the statute bars federal jurisdiction in this case.

Under standard rules of interpretation, this Court must "'give effect, if possible, to every clause and word of [the] statute.'" *U.S. v. Menasche*, 348 U.S. 528, 538-39 (1955) (quoting *Inhabitants of Montclair Township v. Ramsdell*, 107 U.S. 147, 152 (1883)); *see also Mudge v. U.S.*, 308 F.3d 1220, 1228 (Fed. Cir. 2002). The Act specifically uses "assessment," "collection," and "levy."[5] Each of these words has a separate meaning that must be given its full import. *Menasche*, 348 U.S. at 538-39.

In spite of this Court's warning that "federal courts must guard against interpretations of the Tax Injunction Act which might defeat its purpose and text," *Farm Credit Servs.*, 520 U.S. at 827, the panel below narrowly defined the term "assessment" within the Act as: "to estimate officially the value of (property, income, etc.) as a basis for taxation," and "to impose a tax or other charge on." *Winn*, 307 F.3d at 1015. Such reliance on a dictionary is scarcely dispositive when other, equally weighty definitions give a meaning that is congruent with case law. *See, e.g., Webster's Third New International Dictionary* 131 (1981) ("assessment" means "the entire plan or scheme fixed upon for charging or taxing"); *Black's Law Dictionary* 116-17 (6th ed. 1990) ("assessment" means "determining the share of a tax to be paid by each of many persons"); *The Oxford English Dictionary* 506 (1961) ("assessment" means "[t]he scheme of charge or taxation so adjusted").

This "dictionary war" is wholly unnecessary because defining "assessment" as "scheme of taxation" is consistent with the Act's plain language as interpreted by the Ninth Circuit's cases before *Winn v. Killian*. For example, *Poer and Co. v. Counties of Alameda* held, "By its plain language,

---

[5] Under the actual text of the Act, as applied to this case, only the interpretation of "assessment" is at issue, not that of "collection" or "levy."

the Act deprives federal district courts of subject matter jurisdiction over actions for injunctive relief from state taxation schemes." 725 F.2d 1234, 1235 (9th Cir. 1984) (emphasis added); *Bright v. Bechtel Petroleum, Inc.*, 780 F.2d 766, 771 (9th Cir. 1986) (same). Indeed, the Ninth Circuit has interpreted the "expansive language of the Act" as an indication that Congress was not exclusively concerned with foreign corporations using diversity jurisdiction to bleed state coffers, but, rather, to protect the "independent functioning of state tax systems." *Ashton v. Cory*, 780 F.2d 816, 822-23 (9th Cir. 1986).

The narrow definition of "assessment" used below is unsupported by the language of the Act, as interpreted by this Court and by prior Ninth Circuit decisions. Therefore, this Court should hold that Respondents' suit is barred by the Tax Injunction Act because ARIZ. REV. STAT. § 43-1089 is properly understood as "assessment" under Arizona's scheme of taxation. This understanding of the plain text is confirmed by the Act's purpose and legislative history.

2. Arizona has already provided a "plain, speedy and efficient remedy" within the meaning of the Act.

The Tax Injunction Act bars federal court jurisdiction where there is a "plain, speedy and efficient remedy" available in state court. "The Tax Injunction Act embodied Congress' decision to transfer jurisdiction over a class of substantive federal claims from the federal district courts to the state courts, as long as state-court procedures were 'plain, speedy and efficient' and final review of the substantive federal claim could be obtained in this Court." *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 515 n.19 (1981), *reh'g denied*, 451 U.S. 1011 (1981).

As this Court has stated: "The overall purpose of the Tax Injunction Act is consistent with the view that the 'plain, speedy and efficient remedy' exception to the Act's prohibition was only designed to require that the state remedy satisfy certain procedural criteria." *Id.* at 522 (construing the Act's "plain, speedy and efficient remedy" exception).

In *Rosewell*, this Court held that a "plain" remedy is one that is not "uncertain" or "unclear." *Id.* at 517. For a remedy to be "speedy," the matter "must not entail significantly greater delay than a corresponding procedure in federal court." *Brooks v. Sulphur Springs Valley Elec. Coop.*, 951 F.2d 1050, 1055 (9th Cir. 1991) (citing *Rosewell*, 450 U.S. at 519-21), *cert. denied*, 503 U.S. 938 (1992). An "efficient" remedy is one that does not require "ineffectual activity or an unnecessary expenditure of time or energy." *Rosewell*, 450 U.S. at 518.

The Ninth Circuit has agreed with the interpretation of "plain, speedy and efficient remedy" that was given in *Rosewell*: "that the taxpayer be afforded a full hearing and judicial determination in the state courts of any and all federal or constitutional objections to the disputed state tax." *Ashton*, 780 F.2d at 819 (citing *Rosewell*).[6]

Furthermore, according to the Ninth Circuit, an "adequate" state remedy under the Act, "need not necessarily

---

[6] The Ninth Circuit has articulated the adequacy of state court remedies on numerous occasions. *See, e.g., Patel*, 310 F.3d at 1140 ("This statute prohibits both declaratory and injunctive relief in state tax disputes as long as the taxpayer has an adequate remedy in state court."); *Jerron West, Inc.*, 129 F.3d at 1337 ("The only exception [to the Act] is where a state does not provide the Taxpayers with an adequate state remedy."); *Amarok Corp. v. State of Nev., Dept. of Taxation*, 935 F.2d 1068, 1069 (9th Cir. 1991) (action in federal court is barred by the Act if the state provides a remedy that is "plain, speedy and efficient").

be 'the best remedy available or even equal to or better than the remedy which might be available in the federal courts.'" *Mandel v. Hutchinson*, 494 F.2d 364, 367 (9th Cir. 1974) (citing *Bland v. McHann*, 463 F.2d 21, 29 (5th Cir. 1972), *cert. denied*, 410 U.S. 966 (1973)). While the Ninth Circuit trumpeted its role as "guardians of the people's federal rights" in its decision below, *Winn*, 307 F.3d at 1017, Circuit Judge Kleinfeld reminded us that:

> State judges take the same oath to uphold the federal Constitution that we do, and like us are subject to federal Supreme Court review. . . . The implication of the panel's remark about "the federal courts' role as 'guardians of the people's federal rights'" seems to be that we are the *only* such guardians, or that we are guardians of the Platonic sort. We are not. There is no excuse for relitigating the constitutionality of Arizona's tuition tax credit in federal court.

Winn, 321 F.3d at 912 (Kleinfeld, J., dissenting from denial of rehearing *en banc*).

Here, no one has argued that the state remedy is inadequate, or that it is not a "plain, speedy and efficient remedy." The issues have already been litigated to conclusion in the Arizona Supreme Court, and this Court has declined to review that decision. *Kotterman*, 972 P.2d at 606, *cert. denied,* 528 U.S. at 921, *cert. also denied by Rhodes*, 528 U.S. at 810. Therefore, the Respondents cannot challenge the state court remedy as inadequate – just "unwanted." The issues should not be relitigated in federal court merely because Respondents are unhappy with state court decisions.

In addition to textual support for Petitioner's position, the purpose and legislative history of the Act prevent federal court jurisdiction in this case.

B. The Purpose and Legislative History of the Tax Injunction Act Belie the Ninth Circuit's Narrow Interpretation.

1. The Purpose of the Tax Injunction Act Supports a Broad Interpretation of the Act

"[T]he principal motivating force behind the Act" was the "recognition of the imperative need of a State to administer its own fiscal operations." *Rosewell*, 450 U.S. at 522 (quoting *Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976)). In addition, this Court has held that the Act, "and the decisions of this Court which preceded it, reflect the fundamental principle of comity between federal courts and state governments that is essential to 'Our Federalism,' particularly in the area of state taxation." *Fair Assessment*, 454 U.S. at 103.

The historical context of the Act illuminates the Act's purpose. This Court abrogated Eleventh Amendment immunity by allowing federal courts to enjoin state officials in their official capacities. *Ex parte Young*, 209 U.S. 123, 167 (1908). The Act was passed in response to the "congressional hostility to federal injunctions issued against state officials in the aftermath of this Court's decision in *Ex parte Young*," *Rosewell*, 450 U.S. at 522 n.28; *see also Farm Credit Servs.*, 520 U.S. at 826-27. ("Enactment of the Tax Injunction Act of 1937 reflects a congressional concern to confine federal court intervention in state government.").[7] By

[7] Indeed, Justice Harlan's dissent in *Ex parte Young* foreshadowed the arrival of the Tax Injunction Act:

codifying the "decent respect" due the states, Congress restored part of the immunity removed by *Ex parte Young* and "recognized that the autonomy and fiscal stability of the States survive best when state tax systems are not subject to scrutiny in federal courts." *Fair Assessment*, 454 U.S. at 102-103.

As this Court has noted, the Act's authors were concerned with the practice of out-of-state corporations bringing diversity suits to delay "payment of state taxes during the pendency of federal litigation while in-state citizens would have to pay first and then litigate in state courts." *Rosewell*, 450 U.S. at 522 n.29. The *Rosewell* Court recognized, however, that "the expansive language of the statute belies the notion that Congress was concerned exclusively with this problem." *Id.*

This Court has noted that Congress did not legislate in a vacuum - the Act was "motivated in large part by comity concerns," and "the principle of comity which predated the Act was not restricted by its passage." *Fair Assessment*, 454 U.S. at 110. The Act "has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations." *Tully*, 429 U.S. at 73. Against this backdrop of comity, the Court has properly "interpreted and applied the Tax Injunction Act as a 'jurisdiction rule' and a 'broad jurisdictional barrier.'" *Farm Credit Servs.*, 520 U.S. at 825

> Too little consequence has been attached to the fact that the courts of the states are under an obligation equally strong with that resting upon the courts of the Union to respect and enforce the provisions of the Federal Constitution as the supreme law of the land, and to guard rights secured or guaranteed by that instrument. We must assume--a decent respect for the states requires us to assume--that the state courts will enforce every right secured by the Constitution.
>
> 209 U.S. at 176 (Harlan, J., dissenting).

(quoting *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 470 (1976)).

In *California v. Grace Brethren Church*, this Court stated that "Congress' intent in enacting the Tax Injunction Act was to prevent federal-court interference with the assessment and collection of state taxes." 457 U.S. 393, 411 (1982). Respondents would conflate both terms into a single administrative function – the collection of taxes. This limitation on the Act contradicts this Court's observation that the Act's scope extends beyond the mere collection of taxes. *Farm Credit Servs.*, 520 U.S. at 823.

Respondents below relied on *Jefferson County v. Acker*, 527 U.S. 423 (1999), to support their incorrect interpretation of the text of the Act. Appellants' Brief at 14. Respondents' reliance is misplaced. The Tax Injunction Act bars suits restraining "assessment, levy or collection" of state taxes. 28 U.S.C. § 1341. However, *Jefferson County* involved a suit by a county to collect occupational taxes from federal judges. 527 U.S. at 427. This Court held the county's suit was not barred by the Act because it was "not brought to restrain state action." *Id.* at 433-34. At the same time, this Court reaffirmed the principle that the Act's "statutory text 'is to be enforced according to its terms' and should be interpreted to advance 'its purpose' of 'confin[ing] federal-court intervention in state government.'" *Id.* at 433 (citing *Farm Credit Servs.*, 520 U.S. at 826-27). By its very terms, the Act did not apply. Thus, *Jefferson County* is inapposite to this suit brought by taxpayers to restrain state action.

Several appellate courts have properly realized the broad purpose of the Act. The Sixth Circuit has directly held that that the Tax Injunction Act bars federal court jurisdiction in actions that not only interfere with the collection of taxes, but also the assessment and levy of taxes. *Gillis*, 836 F.2d at

1005. The *Gillis* court reasoned, "While admittedly the great majority of cases present plaintiffs seeking to enjoin the collection of taxes, and certainly the most direct threat to the state fisc is presented when the collection of taxes is enjoined, still the Act is not, by its own language, limited to the *collection* of taxes." *Id.* (emphasis added). In reaching this decision, the Sixth Circuit relied on *Grace Brethren* and noted that the language should be interpreted to accomplish this principal purpose. *Id.*

In *Colonial Pipeline Co. v. Collins*, the Eleventh Circuit also held that the Act should be interpreted according to its purpose. 921 F.2d 1237, 1242 (11th Cir. 1991). The court stated:

> In assessing whether a complainant's claim runs afoul of the Tax Injunction Act, we must look not only at whether the literal terms of the statute are implicated, but also at whether the requested relief requires such an exercise of federal judicial power as to collide with the broad purposes of the act.

Id.

Ironically, until this case, the Ninth Circuit treated the Act in a similar fashion. In *Poer and Co. v. Counties of Alameda*, the Ninth Circuit held that the Act barred federal court jurisdiction, although the language of the Act did not cover the action. 725 F.2d at 1236. The Ninth Circuit stated that "the efficacy of the Act's jurisdictional bar could be readily circumvented if the federal courts exercised jurisdiction over tax refund actions." *Id.* Because the "operation of the Tax Injunction Act would be frustrated," the court prohibited federal court jurisdiction over tax refund actions. *Id.* The court relied on its earlier decision, *Dillon v. State of Montana*, 634 F.2d 463 (9th Cir. 1980), in which the

Ninth Circuit held that the Act "is meant to be a broad jurisdictional impediment to federal court interference with the administration of state tax systems." *Poer,* 725 F.2d. at 1236. In *Dillon*, the Ninth Circuit looked to the action's "practical effect on state fiscal operations," and held that the Act barred federal court jurisdiction because it "discern[ed] no significant distinction between the intrusiveness" of the action requested and those "undoubtedly forbidden by § 1341." 634 F.2d at 466. There can be no doubt that Respondents are asking for "intrusion" into Arizona's complex tax administration system that implements a variety of state goals via tax deductions, tax credits, surcharges, penalties, etc.

The clearest statement of the Ninth Circuit's interpretation of the Act is worth quoting at some length:

> We do not think the primary purpose of the Tax Injunction Act was to remedy the inequitable financial advantage enjoyed by foreign corporations in state tax matters. . . . It is true that Congress was concerned about the financial drain on state resources resulting from foreign corporations withholding large sums of money pending the outcome of protracted tax litigation in the federal courts. However, had Congress enacted the Tax Injunction Act solely to address this inequity, it could have limited the Act's jurisdictional bar to federal diversity actions. . . . The Court has long recognized the dangers inherent in disrupting the administration of state tax systems, and the corresponding need for federal court restraint when deciding cases that will affect these delicate state operations. The Court's reluctance to interfere with the assessment and collection of state taxes was evident long before the enactment of the Tax Injunction Act. . . . The independent functioning of state tax systems, which the Tax Injunction Act sought to

> safeguard, would be undermined by allowing federal district courts to exercise jurisdiction over actions such as [this]. Given the congressional concern for state fiscal autonomy, we do not believe Congress intended such a result.

Ashton, 780 F.2d at 822-23 (citations omitted).

Examining the cases where the Ninth Circuit has barred claims on the remote fringe of a state taxation scheme highlights the panel decision's departure from the proper interpretation of the Act and its purpose in this case. For example, the Ninth Circuit held that the Act barred a constitutional challenge to a state constitution's provision limiting a veterans' property tax exemption to residents. *Mandel*, 494 F.2d at 367. The Ninth Circuit noted, "[T]he strong public policy of federal noninterference with state taxation schemes has been statutorily embodied" in the Act. *Id.* at 366. The court recognized that the ability to avoid payment by filing in federal court "would pose a grave threat to the operation of a fiscal system of a state." *Id.* at 365. Moreover, the Ninth Circuit reasoned, "[T]he allowance of an immediate federal remedy would ignore traditional doctrine foreclosing such relief until after the alternative remedies at law have been demonstrated to be inadequate." *Id.* at 365-66. The court looked to *Perez v. Ledesma*, 401 U.S. 82, 128 n.17 (1971), in which Justice Brennan explained:

> The special reasons justifying the policy of federal non-interference with state tax collection are obvious. The procedures for mass assessment and collection of state taxes and for administration and adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules.

Mandel, 494 F.2d at 366. In *Mandel*, the Ninth Circuit held that the Act barred federal court jurisdiction because the tax exemption in that case must fall somewhere under "assessment and collection of state taxes" and "administration" of the state taxation scheme. *Id.* at 366-67. Likewise, the tax credit in this case also falls within "assessment" and the administration of the state taxation scheme, so the Act prohibits federal court jurisdiction. So, too, Arizona's tax credit is one of the "established rules" that is part and parcel of the state's complex procedures for assessing and collecting taxes.

The Ninth Circuit has also held that the Act prohibits federal court jurisdiction where there is an indirect restraint on the assessment of taxes. *Blangeres v. Burlington N., Inc.*, 872 F.2d 327, 328 (9th Cir. 1989). In *Blangeres*, the court stated that the requested injunction would preclude states "from taxing Burlington Northern employees because the states would be unable to obtain the information necessary for assessment." *Id.* According to the court, the injunction would "restrain assessment" of state taxes, so "[t]he fact that the injunction would restrain assessment indirectly rather than directly does not make the Tax Injunction Act inapplicable." *Id.*

In *Comenout v. State of Washington*, 722 F.2d 574 (9th Cir. 1983), the Ninth Circuit reinforced its view that the Act serves as a "broad jurisdictional impediment." *See also Jerron West, Inc. v. State of Cal., State Bd. of Equalization*, 129 F.3d 1334, 1338 (9th Cir. 1997), *cert. denied*, 525 U.S. 819 (1998); *Dillon*, 634 F.2d at 466. The *Comenout* court held that the Act not only barred federal court jurisdiction over a challenge of state excise taxes, but also barred claims against state agents and local police, who were enforcing the tax laws. 722 F.2d at 577-78. The court held that the Act

barred claims of unlawful arrest, assault, damages for lost business, recovery of confiscated goods, and an injunction to prevent the state from entering property. *Id.* The Ninth Circuit held that the Act deprived the court of jurisdiction because maintenance of the suit "would interfere with the enforcement of the state tax scheme." *Id.* at 578. Because the Ninth Circuit has held that claims outside the state's taxation scheme were barred by the Act, surely the Act also bars claims concerning tax credits that are within the state's taxation scheme.

The overwhelming theme throughout these cases is the extremely broad scope of the Tax Injunction Act. In contrast, the Ninth Circuit has ignored the scope of the Act to reach its narrow interpretation, which is inconsistent with comity, this Court's and other circuits' jurisprudence, and even its own prior holdings. The Ninth Circuit also erred in its reading of the Act's legislative history.

2. The Tax Injunction Act's legislative history conflicts with the Ninth Circuit's decision.

One of the reasons this Court has interpreted the language of the Act broadly is because "[n]either the legislative history of the Act nor that of its precursor, 28 U.S.C. § 1342, suggests that Congress intended that federal-court deference in state tax matters be limited to the actions enumerated in those sections." *Fair Assessment*, 454 U.S. at 110. For example, this Court interpreted the Act to bar both injunctive and declaratory relief in state tax cases - even though the Act itself is silent regarding declaratory relief. *Grace Brethren Church*, 457 U.S. at 408.

The Ninth Circuit and Respondents clearly wish that the Act's text referred only to the "collection" of taxes. As the Act also explicitly refers to "assessment," the Ninth Circuit

selectively read the Act's legislative history to conclude erroneously that "there would be no violation of the purposes or policy underlying the Tax Injunction Act" if Respondents' suit continues in district court. *Winn*, 307 F.3d at 1016. In the Ninth Circuit's view, the only possible reason to refuse jurisdiction is if the federal lawsuit threatened to drain the state coffers. *Id.* at 1017. This mechanical threshold is completely at odds with the Act's legislative history.

Certainly the legislative history encompasses the idea that the Act prohibits interference with the collection of taxes. *See* S. REP. No. 1035, at 1-2 (1937); H.R. REP. No. 1503, at 2 (1937). However, to end the inquiry at that point is to ignore not only the language, but also the evident philosophy of federalism that the Act embodies: that the Act is designed to allow state courts to decide questions of state tax law without federal court interference. 81 CONG. REC. 1,417 (1937) (statement of Senator Bone) ("Why not . . . [let] the State courts settle State controversies and confine Federal courts to the settlement of Federal questions?") The legislative history notes that Congress believed it a sufficient "safety valve" for this Court to have the final say in correcting any misinterpretations by a state supreme court. S. REP. No. 1035, at 2 (1937) ("An appeal to the Supreme Court of the United States is available."); H.R. REP. No. 1503, at 2 (1937) (same); 81 CONG. REC. 1,417 (1937) (statement of Senator Bone) ("[The Act] does not take away any jurisdiction of the Supreme Court.").[8] The Act's legislative history clearly supports non-interference by the federal judiciary in this case.

---

[8] In denying *certiorari*, this Court has already declined to look for any error with the Arizona Supreme Court's reasoning. *See Kotterman*, 528 U.S. at 921.

CONCLUSION

Federal courts should refrain from interfering in Arizona's fiscal interests, its social and economic goals for providing the tax credit, and its taxation scheme. "Deductions and credits are legitimate tools by which government can ameliorate the tax burden while implementing social and economic goals." *Kotterman*, 972 P.2d at 613. Arizona should be free to pursue its "imperative need . . . to administer its own fiscal operations." *Rosewell*, 450 U.S. at 522. This Court should reverse the Ninth Circuit and hold that comity and the Act deprive the district court of subject matter jurisdiction.

Respectfully submitted,

BENJAMIN W. BULL*
GARY S. MCCALEB
JOSHUA W. CARDEN
ELIZABETH A. MURRAY
ALLIANCE DEFENSE FUND
15333 N. Pima Rd., Ste. 165
Scottsdale, AZ 85260
(480) 444-0020
(480) 444-0028 (fax)

*COUNSEL OF RECORD

November 13, 2003

63
1631